UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

PRIDDIS MUSIC, INC.,

Plaintiff,

-against-

TRANS WORLD ENTERTAINMENT CORPORATION,

Defendant.

Civil Action No. 05-CV-0491 (DNH/DRH)

REPLY MEMORANDUM OF LAW TO PLAINTIFF'S OPPOSITION TO MOTION TO PARTIALLY DISMISS THE COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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Dated: August 1, 2005

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INTRODUCTION

Defendant Trans World Entertainment Corporation ("TWEC") respectfully submits this Reply Memorandum of Law in response to Plaintiff Priddis Music, Inc.'s Memorandum of Law in Opposition to Defendant's Motion to Partially Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) ("Priddis Mem.").

As fully set forth in TWEC's Memorandum of Law in Support of Motion to Partially Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) ("TWEC Mem."), Priddis attempts to disguise the simple breach of contract claim that it originally filed in the Utah court as an elaborate fraud claim. In its supporting memorandum, TWEC demonstrated that Priddis's fraud claim must be dismissed as a matter of law because (1) the alleged misrepresentations supporting the fraud claim merely involved TWEC's alleged intentions to perform under the parties' various contracts, and (2) the fraud claim is entirely duplicative of Priddis's breach of contract claim. See TWEC Mem. at 11-17.

Recognizing that its initial fraud theory cannot stand as a matter of New York law, Priddis has not responded substantively to TWEC's supporting memorandum. Rather, Priddis has abandoned its theory of fraud based upon TWEC's alleged fraudulent schemes involving returns, discounts and proof of delivery, and sets forth an entirely new theory of fraud in its opposition memorandum.[1] Priddis's new fraud theory relies on four

[1] The Complaint alleges that TWEC participated in three separate fraudulent schemes – the Fraudulent Return Scheme (Compl. ¶¶ 38-55); the Fraudulent Discount Scheme (id. ¶¶ 56-71); and the Fraudulent Proof of Delivery Scheme (id. ¶¶ 72-79) – for the express purpose of withholding payments from Priddis for the karaoke products it ordered and received. See id. ¶¶ 122-30 (First Cause of Action (Fraud)). In its supporting memorandum, TWEC identified the three alleged misrepresentations that Priddis claims it detrimentally relied upon in connection with the fraudulent schemes and its fraud claim: (1) a promise to release an $86,000 payment to Priddis; (2) promises, both orally and in writing, that TWEC would make payments so that Priddis would ship new orders to TWEC; and (3) a promise to release a $360,947 payment of which TWEC only paid $220,143; and demonstrated why such misrepresentations were

distinct alleged misrepresentations. Priddis now asserts that it has adequately alleged that TWEC falsely promised to: (1) use Priddis as its exclusive karaoke supplier, and such promise induced it to enter into agreements with TWEC; (2) purchase products from Priddis on an ongoing basis, and such promise induced it to enter into the Buy Out and Display Agreements; (3) pay restocking fees on all returns to Priddis; and (4) no longer take a 2% discount on returns and anticipated returns. See Priddis Mem. at 13-18. Priddis further argues that the identified misrepresentations are "collateral and extraneous" to the parties' agreements and thus support a claim for fraudulent inducement and/or fraud.[2] For the reasons set forth below, these arguments lack merit and the newly alleged misrepresentations do not support a fraud claim as a matter of law. Additionally, Priddis's claims for conversion and unjust enrichment should be dismissed, as well as its claim for punitive damages.

ARGUMENT

I. PRIDDIS'S FRAUD CLAIM STILL MUST BE DISMISSED AS A MATTER OF LAW

A. TWEC's Alleged Misrepresentation to Use Priddis as Its Exclusive Karaoke Supplier Does Not Support a Fraudulent Inducement Claim

Priddis now asserts that the alleged fraud stems from paragraphs 8 & 10 of the Complaint; and that those paragraphs adequately allege that TWEC induced Priddis to enter into agreements with TWEC by falsely promising to use Priddis as an exclusive

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insufficient as a matter of law. See TWEC Mem. at 12-14. Priddis has apparently conceded this point by failing to respond to TWEC's argument and by setting forth new alleged misrepresentations in its opposition memorandum.

[2] Priddis has adopted the legal framework set forth in Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 19-20 (2d. Cir 1996), which requires that a fraud claim stemming from breach of contract must be "sufficiently distinct" from the contract claim and, thus, any alleged fraudulent misrepresentation must be "collateral and extraneous" to the contract. Cf. TWEC Mem. at 14-14 with Priddis Mem. at 14-18.

supplier for its karaoke racks. See Priddis Mem. at 14. These paragraphs fail to state a claim for fraudulent inducement as a matter of law.

First, the identified paragraphs do not allege that a fraud occurred. Rather, the Complaint merely alleges that TWEC offered Priddis an exclusive distributorship, and fails to allege that TWEC falsely promised to make Priddis an exclusive supplier, or induced Priddis to enter into any agreement.[3] These conclusory statements cannot support a fraudulent inducement claim because they do not survive basic scrutiny under Fed. R. Civ. P. 9(b). Under Rule 9(b), a complaint alleging fraud must: (1) specify the statements that plaintiff contends were fraudulent; (2) identify the speaker; (3) state where and when the statements were made, and (4) explain why the statements were fraudulent. See Stevelman v. Alias Research, Inc. 174 F.3d 79, 84 (2d Cir. 1999). Here, the statements identified by Priddis to support its fraudulent inducement claim do not meet any of the above 9(b) particularity requirements.

Even if paragraphs 8 & 10 of the Complaint properly alleged a fraudulent misrepresentation regarding TWEC's use of Priddis as an exclusive supplier, which they do not, any such misrepresentation is not "collateral or extraneous" to any of the parties' agreements as is required to plead a fraud claim based on a contractual breach. Priddis's attempt to satisfy this standard by claiming that TWEC's exclusive supplier promise to Priddis "is not incorporated into the Buy Out Agreement, the Vendor Agreement or the

[3] Paragraph 8 of the Complaint states: "In 1999, TWEC contacted Priddis with an offer to give Priddis exclusive rights to its karaoke music racks. Prior to this offer, Priddis had not done any business with TWEC." Compl. ¶ 8.

Paragraph 10 of the Complaint states: "TWEC offered Priddis the status of TWEC's exclusive karaoke product supplier to replace Sound Choice, if Priddis agreed to "buy out" TWEC's inventory originally purchased from Sound Choice." Compl. ¶ 10. Significantly, both the elaborate fraudulent schemes alleged in the Complaint and the alleged fraud claim (see supra at n.1), do not reference TWEC's alleged misrepresentation to make Priddis its exclusive karaoke supplier.

Display Agreement" (see Priddis Mem. at 14), is not accurate and contradicts the very documents Priddis cites in support. In fact, the exclusive use of Priddis's product is a term of the Display Agreement.[4]

Finally, Priddis's new fraud claim should be dismissed because any alleged fraudulent misrepresentation regarding TWEC's exclusive use of Priddis as a supplier is duplicative of the breach of contract explicitly pled in the Complaint. See TWEC Mem. at 14-17. The Complaint specifically alleges that TWEC breached the Display Agreement by displaying non-Priddis product on Priddis display racks. Paragraph 23 of the Complaint states in relevant part that: "TWEC frequently displayed non-Priddis product and product from competing companies on Priddis' display racks, contrary to the terms of the Display Agreement. Such conduct was a breach of the Display Agreement and entitles Priddis to the return of the racks or payment of their value." Compl. ¶ 23 (emphasis added). Accordingly, the Complaint only claims that TWEC's alleged failure to use it as an exclusive supplier was a breach of the Display Agreement. See Compl. ¶ 136 ("TWEC failed to perform its obligations under these agreements by, *inter alia*, . . . failing to use Priddis as its exclusive karaoke supplier [and] displaying non-Priddis product in the displays supplied by Priddis . . . .").

Accordingly, Priddis has not adequately alleged that TWEC misrepresented its intention to use Priddis as its exclusive karaoke supplier. And even if such a misrepresentation had been properly alleged, it could not support a fraudulent inducement

[4]The Display Agreement states: "5. Exclusive Use. Displays shall be used exclusively for the promotion of Vendor product. No product from competing companies shall be shown on, or in connection with Vendor Displays." Display Agreement, ¶ 5.

~~claim as a matter of law because the issue regarding exclusive use of Priddis's product is~~ embodied in the Display Agreement and thus duplicative of the breach of contract claim.

B. TWEC's Alleged Misrepresentation to Purchase Products From Priddis Does Not Support a Fraudulent Inducement Claim

Citing only to paragraph 25 of the Complaint, Priddis argues that its allegation that TWEC misrepresented its intention to purchase products from Priddis on an ongoing basis is sufficient to support a fraudulent inducement claim. See Priddis Mem. at 14. However, for the same reasons indicated above (see supra, at 3), this allegation also fails to state a cause of action as a matter of law.

Paragraph 25 of the Complaint does not allege that TWEC falsely promised to order Priddis's products on an ongoing basis, and/or that such misrepresentation induced Priddis to enter into any of the parties' agreements.[5] Additionally, the Complaint itself establishes that the premise underlying Priddis's assertion is flawed – TWEC did order Priddis products on an ongoing basis. See Compl. ¶ 36 ("From 1999 through 2004, TWEC ordered and received a total of $6,192,199 worth of product from Priddis. TWEC paid a total of $3,088,350 in cash for these orders.") (emphasis added). TWEC's right to return product that it had ordered, is currently pled as a breach of contract claim.

Putting aside its deficient pleading, Priddis's substantive argument lacks merit. Although Priddis concedes that "TWEC's obligations regarding the payment of Priddis' products are embodied in the Vendor Agreement," Priddis nonetheless argues that TWEC's alleged "promise to purchase product" is somehow collateral and extraneous to the Buy Out and Display Agreement because the "attendant obligations regarding

[5] Paragraph 25 of the Complaint merely states that "[a]s consideration to enter into the Buy Out Agreement, TWEC agreed to order Priddis product on an on-going basis. TWEC's promise of future orders was Priddis' motivation to enter into the Buy Out Agreement." Compl. ¶ 25.

payment" are not expressly incorporated into the terms of the Buy Out Agreement or the Display Agreement." See Priddis Mem. at 14-15. This assertion, however, ignores a plain reading of the Buy Out Agreement and the Vendor Agreement, as well as the nature of the overall contractual relationship between the parties.

The Buy Out Agreement expressly incorporates TWEC's payments obligations because it contains the pricing and regular terms that Priddis applied to TWEC's future orders. See Buy Out Agreement, Exh B. Likewise, the terms of Display Agreement are premised on TWEC's "best efforts in purchasing and selling [Priddis] product . . . ."[6] Moreover, Priddis ignores the fact that while each of the agreements govern the parties' relationship, those agreements must be read together. Quite simply, TWEC's duties and obligations in connection with the purchase of Priddis's product from Priddis form the core of the Buy Out Agreement, the Vendor Agreement, and the Display Agreement.

Priddis's reliance on Bell Sports, Inc. v. System Software Assoc., Inc., 71 F.Supp.2d 121 (E.D.N.Y. 1999) is inapposite. In Bell Sport, Inc., the court granted a motion for reconsideration and reversed its earlier ruling dismissing a fraudulent inducement claim as duplicative of a breach of contract claim based upon the defendant's argument that any misrepresentation made prior to the parties entering into the contract merely constituted breach of contract. See id. at 126-127. However, the court allowed the plaintiff to resubmit its fraudulent inducement claim because, subsequent to the court's decision, the defendant changed its position and argued that the pre-contractual misrepresentations in fact could not form the basis of a breach of contract claim. See id. at 127. This situation does not exist here.

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[6]. The Display Agreement states in relevant part: "3. Terms. Vendor agrees to advance a display to each store location, as requested by Buyer, against future purchases from Buyer to Vendor. Buyer agrees to continue its best efforts in purchasing and selling Vendor product until enough product has been purchased to fill all Displays shipped by Vendor to Buyer." Display Agreement, ¶ 3.

Accordingly, Priddis's argument – that TWEC's alleged promise to purchase products on an ongoing basis is collateral and extraneous to the Buy Out and Display Agreements – ignores the plain reading of those agreements and is strained and illogical.

C. TWEC's Alleged Misrepresentations That It Would Pay Restocking Fees on Returns and No Longer Take A 2% Discount on Returns Do Not Support a Fraud Claim

Priddis also argues that it has adequately pled two post-contractual misrepresentations that support its fraud claim. First, Priddis claims that it adequately alleges that TWEC misrepresented to Priddis that it would pay restocking fees on all returns to Priddis. See Priddis Mem. at 15-16. Priddis further argues that it continued to accept returns in reliance on TWEC's alleged promise to pay restocking fees, and that this alleged promise is collateral and extraneous because it was made subsequent to the Buy Out, Vendor, and Display Agreements. See id. at 16. Second, Priddis asserts that it adequately alleges that TWEC would no longer take a 2% discount on returns and anticipated returns. See id. Despite Priddis's assertions, these allegations fail to set forth any misrepresentation that would support a fraud claim.

The Complaint does not even allege that TWEC falsely promised to pay restocking fees on returns, or to refrain from taking a discount on returns to Priddis. [7]

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[7] Paragraph 69 of the Complaint states: "Priddis complained about such tactics to higher management at TWEC and was told that TWEC would put new procedures into place so that it would not be taking a discount on returns and anticipated returns. However, TWEC never followed through on its promises and continued to take such discounts." Compl. ¶ 69.

Paragraph 107 of the Complaint states: "Finally, Priddis agreed to accept TWEC's return upon payment of a restocking fee, which started at 10% and then was raised to 12%, on all items returned. This fee was necessary to off-set the 2% discount and the 10% rack fee taken by

Rather, the Complaint simply alleges that TWEC promised, yet failed, to pay such fees and/or to stop taking such discounts. These allegations only support a breach of contract claim --which is precisely what Priddis has specifically set forth in its Complaint. See Compl. ¶ 136.[8] Thus, for the same reasons illustrated above (see supra, at 3), these allegations do not support a fraud claim.

In addition, even if these allegations were adequately pled as misrepresentations, they are not sufficiently collateral or extraneous to the parties' existing agreements to support a fraud claim independent of Priddis's breach of contract claim. Citing Kelly v. MD Buyline, Inc., 2 F.Supp.2d 420 (S.D.N.Y. 1998) and Blank v. Baronowski, 959 F.Supp. 172 (S.D.N.Y. 1997), Priddis argues that the alleged failed promises relating to restocking fees and discounts are collateral and extraneous to the Buy Out, Vendor and Display Agreements because the alleged promises were subsequent to, and not expressly incorporated in, those agreements.[9] However, the mere fact that a party alleges that a

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TWEC. Without such fee, TWEC would pay to Priddis only 88% of the invoiced amount while getting credit for 100% of the original invoiced amount." Compl. ¶ 107.

Paragraph 108 of the Complaint states: "TWEC agreed to these conditions in various conversations and emails. Further, after receipt of these return conditions, TWEC continued to order from Priddis and Priddis continued to ship such orders." Compl. ¶ 108.

Paragraph 112 of the Complaint states: "Because TWEC insisted on taking credit for returns that did not meet Priddis' conditions, Priddis informed TWEC that it would accept these returns only upon the condition that TWEC agree to pay Priddis a 25% restocking fee for such returns. On July 13, 2000, TWEC agreed in writing to such a fee. However, TWEC thereafter failed and refused to pay such a fee." Compl. ¶ 112.

[8] Paragraph 136 of the Complaint states in relevant part that: "TWEC failed to perform its obligations under these agreements by , *inter alia*, . . .taking a discount on returns, taking a discount on returns of non-Priddis product, . . . taking a discount on anticipated returns . . . [and] failing to pay Priddis' restocking fees . . . ." Compl. ¶ 136.

[9] Priddis cites Smehlik v. Athletes & Artists, Inc., 861 F.Supp. 1162, 1172 (W.D.N.Y. 1994) for the proposition that an alleged promise not encompassed by the parties' contractual arrangement presents a factual dispute that precludes dismissal on a Rule 12(b)(6) motion. See Priddis Mem.

contract was orally modified at a later date does not, standing alone, make it sufficiently collateral and extraneous from the contract such that a fraud claim can be pled.

Moreover, both Kelly and Blank are not on point. In Kelly, the plaintiff attorney alleged that the defendant client induced him to agree to modify the parties' retainer agreement and accept a reduced fee with a deliberate misrepresentation that the defendant client would fully pay the remaining fees due under the retainer agreement. See 2 F.Supp.2d at 428-29. Based on the unique facts of the case, the court in Kelly held that the plaintiff could maintain both fraud and contract claims because the defendant took the position that the retainer agreement was void against public policy and, thus, its alleged promise to perform under that agreement created obligations that were "arguably collateral" inasmuch as they went above and beyond the retainer agreement. See id. at 434-35.

In Blank, the plaintiff investor alleged breach of an oral joint venture agreement that he and the defendants had entered into to acquire an off-shore insurance company, and fraud based upon allegedly false representations regarding the existence of the joint venture agreement made in order to induce the plaintiff to loan more money into the venture. See 959 F.Supp at 176-77, 180. Noting it was a "close question" whether the complaint adequately pled misrepresentations collateral to the oral joint venture agreement, the court nonetheless allowed the plaintiff to maintain his fraud claim because the alleged misrepresentations regarding the existence of the joint venture agreement

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at 16 n.2. Priddis misreads the case. In denying a Rule 12(b)(6) motion to dismiss, the court in Smehlik simply held that it could not determine whether certain alleged oral promises would be encompassed in a written contract which obligated the defendant to use its "best efforts" on behalf of the plaintiff. See 861 F.Supp at 1172. Additionally, Smehlik predates the Second Circuit's holding in Bridgestone/Firestone that a fraud claim cannot be sustained on the basis of an allegation that the defendant made a promise to perform under the terms of the contract – an issue the Smehlik court recognized but did not resolve. See id. at 1172-73.

were a "present fact" rather than a future intent to honor the terms of the agreement. See id. at 180. Unlike Blank, Priddis does not allege any misrepresentation of present facts, but only that TWEC did not fulfill its alleged promise to pay the restocking fees.

II. PRIDDIS'S CONVERSION AND UNJUST ENRICHMENT CLAIMS, AND ITS CLAIM FOR PUNITIVE DAMAGES, MUST BE DISMISSED AS A MATTER OF LAW

Priddis argues that its conversion claim is not duplicative of its breach of contract claim because it has "alleged several fraudulent misrepresentations... that go beyond a breach of contract and that have resulted in TWEC's wrongful possession of Priddis' property." Priddis Mem. at 18. This argument lacks merit. The four alleged misrepresentations identified by Priddis are the same alleged actions that form its breach of contract claim. See Compl. ¶ 136. Accordingly, Priddis's conversion claim is entirely duplicative of its breach of contract claim and must be dismissed.

Priddis also argues that its unjust enrichment claim should not be dismissed because a dispute exists regarding the existence, scope and/or enforceability of the parties' agreements. See Priddis Mem. at 19. However, as demonstrated in its original supporting memorandum and above, Priddis has not adequately alleged a fraudulent inducement claim, and no dispute regarding the validity of any of the parties' agreements exists. The contractual modifications asserted by Priddis are already pled in the current breach of contract claim. Priddis may pursue any remedy for alleged contractual modifications through its breach of contract claim. If the Court determines that no valid contractual modifications exist, then any unjust enrichment claim must be limited to the duties that TWEC allegedly agreed to in those modifications. Additionally, if the Court dismisses Priddis's tort claims, its claim for punitive damages should also be stricken.

CONCLUSION

For the above reasons, TWEC respectfully submits that the Court dismiss Priddis's claims for fraud, conversion and unjust enrichment, as well as its claim for punitive damages.

Dated: August 1, 2005

Respectfully Submitted,

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